



ATTORNEY GENERAL OF TEXAS
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Ms. Cynthia Villarreal-Reyna
Section Chief- Agency Counsel
Legal & Compliance Division, MC 110-1A
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OR2005-09524

Dear Ms. Villareal-Reyna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 234656.

The Texas Department of Insurance (the "department") received two requests for copies of the vendor responses submitted to the department in response to request for information number 454-RFI-SB1670, including "score sheets, verification sheets or similar items." You inform us that the department does not maintain information responsive to the request for "score sheets, verification sheets or similar items."¹ You claim that some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. You take no position as to whether the remaining submitted information should be withheld but believe that its release may implicate the proprietary interests of third parties. Accordingly, you state that the department has notified the following third parties, whose proprietary interests may be implicated, of the request for information and of each company's right to submit arguments to this office as to why the information should not be released: IVIN Consulting, L.L.C. ("IVIN"); HTC Global Services ("HTC"); ChoicePoint Services

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Inc. (“ChoicePoint”); Computer Sciences Corporation (“CSC”); Texas Insurance Checking Office, Inc. (“Texas Insurance”); PASCO, Inc. (“PASCO”); Insure-Rite Incorporated (“Insure-Rite”); Digital Traffic Solutions (“DTS”); Explore Information Services, L.L.C. (“EIS”); Verification Solutions, Inc. (“VeriSol”); IBM; TransCore, L.P. (“TransCore”); Wellington Financial Services, Inc. (“Wellington”); L.E.A.D.S. Online (“LEADS”); Texas Coalition for Affordable Insurance Solutions (“Texas Coalition”); American Insurance Association (“AIA”); Insurance Industry Committee on Motor Vehicle Administration (“IICMVA”); HDI Solutions (“HDI”); and InsureNet USA, Inc. (“InsureNet”). *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received arguments from IVIN, ChoicePoint, PASCO, DTS, IBM, and Wellington; we have considered the submitted arguments and reviewed the submitted information.²

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, the following companies have not submitted comments explaining why their information should be withheld from disclosure: HTC, CSC, Texas Insurance, Insure-Rite, EIS, VeriSol, TransCore, LEADS, Texas Coalition, AIA, IICMVA, HDI, and InsureNet. Thus, none of these companies has demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110; *see also, e.g.,* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the department may not withhold any of the submitted information on the basis of any proprietary interest that these companies may have in the information.

Next, we understand IBM and Wellington to contend that the requested records, or portions thereof, are protected under section 552.104 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” However, section 552.104 is a discretionary exception that protects only the

²We note that the department submitted a portion of PASCO’s response after the time period prescribed by section 552.301 of the Government Code. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body must submit copy of requested information within fifteen business days of receiving the request). However, because third-party interests and section 552.137 of the Government Code can provide compelling reasons to withhold information, we will address the claimed exceptions with respect to this information, as well as the remaining submitted information. *See* Open Records Decision No. 150 at 2 (1977) (compelling interest demonstrated when other source of law makes information confidential or third-party interests at stake).

interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). In this instance, the department has not raised section 552.104 as an exception to disclosure. Thus, we conclude that none of the information at issue may be withheld under section 552.104.

Next, IVIN, ChoicePoint, PASCO, DTS, IBM, and Wellington claim that portions of their responses are excepted from disclosure under section 552.110 of the Government Code.³ This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” *See* Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts

³Although Wellington and ChoicePoint also raise section 552.101 of the Government Code for their proprietary information, section 552.110 of the Government Code is the proper exception to claim for this type of information. *See* Gov’t Code § 552.110(a), (b).

the claim as a matter of law.⁴ See Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). See Open Records Decision No. 402 at 3 (1983).

Section 552.110(b) excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. See Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing each company’s arguments and the submitted information, we find that IBM has established a *prima facie* case that the information it seeks to withhold constitutes trade secret information for purposes of section 552.110(a). We also find that IVIN, PASCO, DTS, and Wellington have established a *prima facie* case that some of the information they seek to withhold constitutes trade secret information. We have not received any arguments that rebut the companies’ claims as a matter of law. Therefore, the department must withhold this information, which we have marked in these companies’ responses, pursuant to section 552.110(a) of the Government Code. We also find that PASCO has established that some of its pricing information, which we have marked, is protected under section 552.110(b); the department must also withhold this information. However, we find that none of these companies has established by specific factual evidence that any of the remaining information is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the companies substantial competitive harm under section 552.110(b). See RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); Open Records Decision Nos. 661 (1999), 319 at 3 (1982). As such, none of the information in

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

ChasePoint's response and none of the remaining information in IVIN's, PASCO's, DTS', IBM's, and Wellington's responses may be withheld under section 552.110.

Next, the department, IVIN, and PASCO contend that some of the remaining submitted information is subject to section 552.137 of the Government Code. This section excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not except from disclosure e-mail addresses that are "contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]" Gov't Code § 552.137(c)(3). The e-mail addresses at issue are contained in responses to an invitation for information solicited by the department and relate to a potential future contract that could be entered into in the future. As such, we conclude that the submitted e-mail addresses may not be withheld under section 552.137.

Lastly, the department advises that some of the remaining submitted information is subject to copyright law. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold the information we have marked in IVIN's, IBM's, PASCO's, DTS's, and Wellington's responses pursuant to section 552.110 of the Government Code. The department must release the remaining submitted information to the requestors; however, in releasing information that is protected by copyright, the department must comply with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

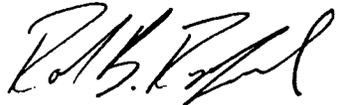
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



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RBR/krl

Ref: ID# 234656

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